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ALEXANDER

No. 82-96
IN THE

Supreme Court of the United States

October Term, 1982

SINAI TEMPLE, a nonprofit religious corporation, WILLIAM FRIEDLAND, MILTON SIEGEL, DORIS SIEGEL, and MOUNT SINAI MEMORIAL PARK, a division of SINAI TEMPLE,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

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Real Party in Interest, Marvin Smotrich, hereby respectfully opposes Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, filed by petitioners herein, and respectfully request that said petition be denied. The Court of Appeal of the State of California, Second Appellate District, denied petitioners' Petition for Writ of Mandate directed to Respondent Court, and the Supreme Court of California denied a Petition for Hearing.

Opinion Below.

The Court of Appeal opinion is set forth in Appendix A of the Petition for Writ of Certiorari and is referred to as if set forth in full herein. The Supreme Court of California denied a Petition for Hearing and rendered no opinion. The Respondent Court, in its decision upon which the Petition for Writ of Mandate was based, rendered an unreported minute order which is set forth in Appendix B of the Petition for Writ of Certiorari and is referred to as if set forth in full herein.

Statement of the Case.

Real Party in Interest hereby accepts and adopts the Statement of the Case as set forth in the Petition for Writ of Certiorari and incorporates the same by reference as though set forth in full herein.

STATEMENT OF REASONS FOR DENYING THE WRIT OF CERTIORARI.

I.

The Discovery Sought Is Not Barred by the First Amendment's Freedom of Religion Clause.

The lawsuit brought by Real Party is based upon tortious and wrongful conduct without reference to considerations of faith, belief or church tenets. The Second Amended Complaint, as set forth in Appendix E of the Petition for Writ of Certiorari and is referred to as if set forth in full herein, contains allegations of wrongdoing on the part of both petitioners and Hillel Silverman, petitioners' employee and agent.

None of the twenty requests for admissions and interrogatories violates petitioners' constitutional right to freedom of religion. The First Amendment's freedom of religion guaranty does not provide petitioners with an all-encompassing blanket of protection against liability for their tortious and wrongful conduct. Activities conducted by a religious organization are frequently subject to civil court jurisdiction, particularly when the wrongful conduct alleged is tortious in nature.

If the protection of third parties and the public is at issue, such protection itself outweighs any claim to First Amendment protection. It has been said that the freedom of religion guaranty cannot be used to thwart a state's legitimate police power and may not be used to escape liability to innocent third parties or to the public. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court stated that a religious organization may not, with impunity, commit frauds upon the public and conduct remains subject to regulation for the protection of society. *Id.* at 303-304, 306.

In *Braunfield v. Brown*, 366 U.S. 599 (1961), the Court upheld a Pennsylvania criminal statute which prescribed the Sunday retail sale of certain goods, rejecting the petitioner's argument that the law violated the First Amendment's guaranty of freedom of religion, stating that:

> "However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. Cantwell v. State of Connecticut, supra, 310 U.S. at pages 303-304, 306, 60 S.Ct. at pages 903-904. As pointed out in Reynolds v. United States, supra, 98 U.S. at page 164, legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, . . ." *Id.* at 603.

In *General Counsel on Finance and Administration of the United Methodist Church v. Superior Court*, 439 U.S. 1355 (1978), the applicant applied for a temporary stay of proceedings in the Superior Court of the State of California for the County of San Diego in which it was a defendant in a class action suit for fraud, breach of contract and other wrongful conduct. The Superior Court had denied the applicant's motion to quash service of process for lack of personal jurisdiction and the applicant applied for a temporary stay, contending that the Superior Court's action violated its First Amendment guaranty of freedom of religion. Justice Rehnquist, in denying the application for temporary stay, stated that:

> "In my view, applicant is plainly wrong when it asserts that the First and Fourteenth Amendments prevent a civil court from independently examining, and making the ultimate decision regarding, the structure and actual operation of hierarchical church and its constituent units in an action such as this. There are constitutional limitations on the extent to which a civil court may

inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating interchurch disputes. See *Serbian Eastern Orthodox Diocese v. Milivojevich*. This Court never has suggested that those constraints similarly apply outside the context of such intraorganization disputes. Thus, *Serbian Eastern Orthodox Diocese* and the other cases cited by applicant are not in point. Those cases are premised on a perceived danger that in resolving intrachurch disputes the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular, doctrinal beliefs. 426 U.S. at 709-710, 96 S.Ct. at 2380-2381. Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religiously affiliated organization, in which fraud, breach of contract, and statutory violations are alleged. As the Court stated in another context: 'Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public.' Cantwell v. Connecticut, 310 U.S. 296, 306, 60 S.Ct. 900, 904, 84 Lawyers Ed. 1213 (1940)." *Id.* at 1372-1373.

In light of the foregoing, it is clear that none of the requests for admission or interrogatories violate petitioners' First Amendment rights. Each of the questions and requests relate to Hillel Silverman's *secular* capacity as a marriage counselor and petitioners' knowledge of activities conducted by Hillel Silverman in his capacity as a marriage counselor. The sought-after discovery is relevant to prove or disprove the allegations contained in the Second Amended Complaint as it relates to the causes of action for negligence, fraud and other wrongful conduct. No inquiry is being directed into the petitioners' religious functions. The only discovery is directed to a purely secular function performed by one of

the petitioner's employees acting in a secular capacity. Real Party is not attempting to question "who shall preach from the pulpit" because the lawsuit surrounds non-rabbinical functions, namely, functions relating solely to marriage counseling. The area of inquiry should be allowed to protect innocent third parties from fraudulent and wrongful conduct committed by a religious organization. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Conclusion.

Because the information requested is not protected by the First Amendment, Real Party respectfully requests that the Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, be denied. The order was not unconstitutional and was not an abuse of discretion.

Respectfully submitted,

ARTHUR D. RUTLEDGE,

Attorney for Real Party in Interest.